

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

UNITED STATES OF AMERICA,

Plaintiff,

v.

GALEN N. KIRKWOOD,

Defendant.

CASE NO. CR11-5488RBL

ORDER

THIS MATTER comes before the Court on Defendant's Motion to Suppress Evidence [Dkt. #99]. The Court has reviewed the materials for and against the motion. The Court has conducted a hearing with witnesses and argument of counsel. Based upon the evidence submitted on both sides of this issue, the Court **DENIES** the Defendant's Motion to Suppress Evidence.

This case resulted from an investigation into the cultivation and distribution of psilocybin mushrooms, a Schedule I controlled substance. As described in the affidavit submitted to Magistrate Judge James Donohue, the investigation developed evidence that the Defendant Galen Kirkwood was operating a mushroom cultivation operation and was dealing with Michael Maki, the apparent leader of a group of mushroom distributors.

1 Agents originally presented to the Magistrate Judge a master affidavit that supported
2 applications for a search warrant at multiple locations. The Magistrate Judge issued all of the
3 requested search warrants except for the warrant requested for the Defendant Kirkwood's
4 property. The agents, after consulting with government counsel, then undertook to develop more
5 evidence to support the issuance of a warrant, including a carefully-planned nighttime foray onto
6 the defendant's property to make surreptitious observations of the buildings in a clearing on the
7 property. The agents planned to, and in fact did, make their observations from the edge of the
8 forest surrounding the clearing. The observations of the building and other items of the property,
9 including observations consistent with a mushroom cultivation site, were included in a revised
10 affidavit. The Magistrate Judge ultimately issued the requested warrant only after the affiant
11 added (1) the new information about the nighttime observations, and (2) new information
12 detailing the discovery of three other cultivation sites as a result of the three search warrants that
13 the Magistrate Judge had issued earlier based on the master affidavit.

14 In an attempt to bolster the factual predicate for the search warrant of Kirkwood's
15 property, the agents entered the defendant's rural property through a circuitous route. In
16 planning this trip, there were limits imposed as to how far the agents could encroach onto the
17 property so as not to invade what could arguably and conservatively be considered curtilage.
18 The agents were careful never to enter what could be considered curtilage and made only those
19 observations that could be made from the edge of the woods surrounding the clearing containing
20 the defendant's residence and the two-story building.

21 The affidavit described the property as two adjoining parcels of 3.48 and 9.40 "heavily
22 wooded" acres with a manufactured home and a pole barn in "close proximity" to each other.
23 The affidavit further described that "agents planned a nighttime surveillance operation to obtain
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1 more information about the Kirkwood property. Agents planned to approach the site containing
2 the buildings on the Kirkwood property by traveling on foot through the rough woods and then
3 observing the building site from the edge of the clearing.” The affidavit then described that the
4 agents in fact “hiked through a property west of the Kirkwood property through a forested area to
5 the edge of a clearing on the Kirkwood property approximately 50 feet from the southwest side
6 of a large metal two-story structure.” It is clear from this description that the agents were on the
7 Kirkwood property when they made their observations. They were “on the Kirkwood property”
8 only 50 feet from the side of the large structure on a parcel of more than 12 acres. The agents
9 planned to, and in fact did, enter the Kirkwood property and the affidavit did not conceal that
10 fact.

11 From the vantage point at the edge of the woods, the agents could hear ventilation
12 equipment operating inside the barn. They observed the three ventilation points in the back wall
13 of the barn.

14 Remaining in the woods they circled around the house and the barn to another clearing to
15 the north of the structures. They observed a manure pile, a greenhouse in the early stages of
16 construction, and empty boxes that had contained ventilation equipment, air conditioner with
17 filtration, and bleach. These are some of the ingredients and the tools used in growing
18 mushrooms.

19 Both sides concede that the definition of the curtilage on this property is outcome
20 determinative. The Fourth Amendment protects the curtilage of a home, and the extent of the
21 curtilage is determined by whether the individual may reasonably expect that the area in question
22 should be treated as the home itself. *United States v. Soliz*, 129 F.3d 499, 502 (9th Cir. 1997)

1 (fenced area around house not curtilage where gate had fallen down, no “no trespassing” signs
2 were in place, and the fence surrounding the house was a chain link fence).

3 There is no bright line test for identifying the curtilage. It is a factually intense
4 determination. There are guideposts established for the journey. Briefly put, it is necessary to
5 distinguish “open fields” or “wilderness” from the mansion-house and the area “to which the
6 activity of the home life extends.” *United States v. Dunn*, 480 U.S. 294, 302 (1987). The four-
7 part test requires the Court to examine: (1) the proximity of the area claimed to be curtilage to
8 the home; (2) whether the area is included within an enclosure surrounding the home; (3) the
9 nature of the uses to which the area is put; and (4) the steps taken by the residents to protect the
10 area from observation by people passing by. *Dunn*, 480 U.S. at 301.

11 **A. Proximity**

12 Generally, “there is not any fixed distance at which curtilage ends.” *United States v.*
13 *Depew*, 8 F.3d 1424, 1427 (9th Cir. 1993). It must be determined on a case-by-case basis. The
14 Second and Third Circuits have noted the importance of considering whether the area in question
15 is in a rural, urban or suburban setting. *See, United States v. Riley*, 76 F.3d 1271, 1277, *on*
16 *rehearing*, 91 F.3d 331, (2nd Cir. 1996). These courts have reasoned that the curtilage of a home
17 in a rural area could extend farther than the curtilage of a home in an urban or suburban setting.
18 The realities of rural country life dictate that distances between out buildings will be greater than
19 on urban or suburban properties and yet still encompass activities intimately associated with the
20 home; this is the nature of the “farmstead.” *See, United States v. Furrow*, 229 F.3d 805, 817 (9th
21 Cir. 2000).

22 **B. Enclosure**

23 The second factor analyzes whether the area is included within enclosures surrounding
24 the home. “For most homes, the boundaries of the curtilage will be clearly marked; and the

1 conception defining curtilage – as the area around the home to which the activity of home life
2 extends – is a familiar one easily understood from our daily experience.” *Dunn*, 480 U.S. at 302.
3 In rural pieces of property, as here, natural boundaries such as thick trees or shrubberies may also
4 indicate an area “to which the activity of home life extends.” *Dunn*, 480 U.S. at 302.

5 The government accepts a conservative, common sense analysis of these first two factors.
6 There were no fences around the home or the outbuildings. There were clearly demarked
7 clearings that they were careful to not encroach. The clearing was suitable for the activities that
8 are intimately associated with the home (i.e., washing equipment, building structures, parking
9 vehicles, storing equipment). It makes sense that the curtilage shall be limited to the clearing
10 immediately around the inhabited buildings.

11 **C. Use**

12 The defendants argue that the entirety of their property is their “yard.” From personal
13 experience growing up on a farm, we knew the difference between the fields where we
14 cultivated, tended and harvested crops versus the house and the property where we grew flowers,
15 entertained guests, barbequed, and took care of pets, as compared to our horses, pigs, sheep, and
16 cattle.

17 Here, the defendants have a trail around their property where they walk for exercise,
18 forage for leafy plants for their salad, and places to sunbathe. The curtilage cannot be extended
19 by their need to hike or sunbathe or gather food. To define such conduct as “activities intimately
20 associated” with the home and thereby expand the definition of curtilage stretches the definition
21 beyond all recognition.

22 **D. Visibility**

23 The fourth *Dunn* factor focuses on the steps taken by Kirkwood to prevent observation of
24 the area from passers-by. The residential area is not visible from any public space or from the

1 coded gate which is locked. He posted "no trespass" signs intermittently. Mr. Kirkwood lives in
2 a forest. To the southwest he has a neighbor whose property is fenced. To the north and
3 northwest he is bounded by a tree farm that has no fences. And on the east he has a neighbor
4 who values his privacy to a similar extent as Mr. Kirkwood, but people can hike in forested areas
5 and come upon the Kirkwood property. The coded gate is an impediment to motor vehicles, but
6 an intrepid person can park their vehicle and walk around the gate and explore the property.

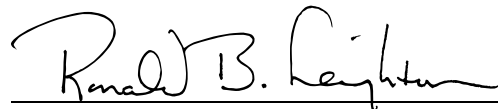
7 The definition of curtilage is not co-extensive with their subjective expectation of
8 privacy. Calling their entire property as "yard" does not expand the law concerning the
9 curtilage.

10 The definition of the curtilage in this case extends to the edge of forested areas in close
11 proximity to the home. The agents did not encroach upon the curtilage. They told the
12 Magistrate Judge what they had done and what they observed. The Magistrate Judge decided to
13 issue the search warrant. He too, did not conclude that the agents had invaded the curtilage or
14 conducted an unlawful search.

15 The Motion to Suppress Evidence [Dkt. #99] is **DENIED**.

16 **IT IS SO ORDERED.**

17 DATED this 9th day of May, 2012

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20 Ronald B. Leighton
21 United States District Judge
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